
CANADA / JUDGMENT

Lightle v. Kotar

2014 BCSC 2181

COURT

Supreme Court of British Columbia

DECIDED

20 November 2014

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2014 BCSC 2181 Lightle v. Kotar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lightle v. Kotar,

2014 BCSC 2181

Date: 20141120

Docket: E093946

Registry: Vancouver

Between:

Elizabeth Jane Lightle

Claimant

And

Hugo Michel Nicholas Kotar

Respondent

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Claimant:

L.N. MacLean

P. Liu, A/S

Appearing on his own behalf:

H. Kotar

Place and Date of Hearing:

Vancouver, B.C.

August 1, 2014

September 18, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 20, 2014

INTRODUCTION

- [1] The respondent Hugo Kotar applies to cancel or reduce arrears of child and spousal support for 2013; and to continue a reduction in support granted for the period January 1, 2014 to August 31, 2014.

BACKGROUND

- [2] The parties' 16-year relationship ended in a divorce pronounced in September 2012. There are two children of the marriage, aged 8 and 5, who live with their mother as provided for in the consent order the parties entered into.
- [3] After a six-day trial in April and May of 2012, Mr. Justice Affleck made a number of orders concerning property and support issues. He found Mr. Kotar had an income of \$200,000 and ordered him to pay child support of \$2,500 per month and spousal support for five years in the amount of \$1,100 per month: *Lightle v. Kotar*, 2012 BCSC 1363 at paras. 77-78, 81.
- [4] In February 2014, the Court of Appeal adjusted Ms. Lightle's income to \$42,500, accepted the trial judge's finding that Mr. Kotar's income for 2012 was \$200,000, and set spousal support at \$3,095 per month and child support at \$2,734 per month: *Lightle v. Kotar*, 2014 BCCA 69 at paras. 66, 77.
- [5] The Court of Appeal, at para. 24, also held that Mr. Kotar's book of business was a family asset that should have been valued and divided at trial. That issue was sent back to the trial judge for determination. Leave was also granted for the parties to review the appropriate level of support payable after the book of business was valued and divided because those adjustments could affect a party's income or income earning capacity. Neither party has taken steps since the appeal to set the valuation issue down for hearing. In the meantime, the support ordered by the Court of Appeal remains in place.

- [6] Mr. Kotar has been self-represented in these proceedings since the conclusion of the trial in May 2012. He applied in March 2014 to reduce the amount of support payable. He did so on the basis that he had lost his job with PI Financial in the first week of December 2013, and no longer had the means to pay support. Mr. Kotar advised the Court that he expected to find employment by August 2014. On April 8, 2014, I granted the orders sought on the following terms:
1. Commencing January 1, 2014, spousal support payments by the Respondent to the Claimant are suspended until September 1, 2014. For greater clarity, this period from January 1, 2014 until September 1, 2014 shall not be counted in the running of time until spousal support is reviewed.
 2. The Order of the Honourable Mr. Justice Affleck, pronounced September 17, 2012, is hereby varied such that child support is reduced to \$407 per month, commencing January 1, 2014 until September 1, 2014.
 3. If the Respondent has been unable to find a suitable position by August 31, 2014, he is at liberty to apply for an extension of this Order. If no such application is made, then support shall revert, effective September 1, 2014, to the amounts of \$2700 as set out in the Order of the Honourable Mr. Justice Affleck pronounced September 17, 2012 and spousal support in the amount of \$3,095 as determined by the Court of Appeal in their judgment pronounced February 21, 2014.
- [7] In summary, the support payments were reduced to \$407 per month in total from January 1, 2014 until September 1, 2014, with leave to Mr. Kotar to apply to continue that level of reduced support if he had not found employment by September 1, 2014.
- [8] The matter came back before me on September 18, 2014, to hear Mr. Kotar's application to continue the reduced level of support and to address the issue of reduction or cancellation of arrears owing for 2013, an issue that had been adjourned in March pending production of further financial information by Mr. Kotar.

THE CLAIMANT'S CROSS-APPLICATIONS

- [9] The claimant Jane Lightle also filed an application in March 2014. Most of that application related to enforcing existing orders requiring Mr. Kotar to produce financial information. At the September 18 hearing, Mr. Kotar asserted that he had complied with all of the orders for production of information, but Ms. Lightle continued to dispute that. There was insufficient time set by the parties to address the cross-application. However, the parties were able to agree to the relief sought at paragraphs 9 and 10 of the claimant's notice of application filed March 10, 2014.
- [10] I therefore order by consent:

- (a) The claimant may leave the country with the children for up to two weeks at a time without a travel authorization from the respondent;
 - (b) The claimant is to send the respondent notice by email three weeks in advance of any trip that is more than 48 hours, and two business days' in advance for any trip that is less than 48 hours. The notice is to include the trip itinerary, including where the children will be going, how they will be travelling, and dates of departure and return;
 - (c) The claimant will provide makeup access to the children for days Mr. Kotar misses because of the claimant's travel with the children, with the parties to agree on such dates.
- [11] The parties agree that the alternative relief sought at paragraph 10 of the notice of application should be dismissed and I make that order.
- [12] Finally, I address paragraph 8 of the notice of application. The claimant contends that the respondent should not be permitted to obtain any relief relating to support until he has complied with his outstanding obligations to pay support.
- [13] As at the March hearing, Mr. Kotar applies to vary orders requiring him to pay significant sums of spousal and child support. He does so on the basis that he no longer has the means to make payments of that magnitude. Mr. Kotar is doing exactly what a payor who says he can no longer afford to pay support is required to do. Indeed I encouraged Mr. Kotar to apply to vary the support orders when he advised the Court in earlier proceedings that he was in arrears because he was unable to make the payments he had been ordered to make.
- [14] This issue was also raised by the claimant at the March hearing. It was squarely addressed in my oral reasons for judgment of April 8, 2014. The Court has discretion to hear an application by a party in non-compliance with an order. I conclude that it would be a Catch-22 indeed if a payor who no longer has the funds to make support payments is precluded from making an application to address that problem because he has not made the payments he does not have the means to make.
- [15] In summary on this issue, the relief sought by the claimant at paragraph 8 of the notice of motion is dismissed; Mr. Kotar is not precluded from proceeding with his application.

MR. KOTAR'S APPLICATIONS

- [16] I return now to Mr. Kotar's applications to reduce arrears for 2013, and to continue the reduction in support ordered from January 1 to August 31, 2014.
1. Application to vary support prospectively
- [17] At the hearing before me in March 2014, Mr. Kotar expected that he would find work by the end of August. It was on that basis that I varied support to reflect his unemployment until August 31, 2014. The onus was on Mr. Kotar if he had not found employment at that time to apply for a continued variation beyond that date.

[18] As on his original application to reduce support, s. 17 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) governs:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[Emphasis added.]

[19] Mr. Kotar has the onus of establishing that a material change in circumstances has occurred and that the change warrants judicial intervention: *Walters v. Walters*, 2011 BCCA 331, at paras. 48-49; *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307, 33 A.C.W.S. (2d) 451 at 313 (B.C.C.A.).

[20] The principles governing an application to vary a support order were summarized by Abella and Rothstein JJ. in *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 29, 32, 34-35:

[29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse since the making of the spousal support order.

[32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.

[34] The decisions in *Willick* and *G. (L.)* also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.

[35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49).

[Emphasis in original.]

- [21] As I have noted, Mr. Kotar was ordered to pay support based on income of \$200,000. Mr. Kotar lost his job in December 2013. He was fired abruptly after his employer PI Financial discovered Mr. Kotar had failed to declare ownership of an offshore account in Panama. He has since January 2014 been "earning" \$501 per week in employment insurance, giving him an annualized income of \$26,052.
- [22] In reasons for judgment delivered April 8, 2014, I concluded that this change in Mr. Kotar's employment status was a material change in circumstances that was unforeseen and of a continuing nature sufficient to vary support: *T.(T.L.A.) v. T.(W.W.)* (1996), 26 B.C.L.R. (3d) 319 at para. 34 (C.A.).
- [23] As on the March 2014 hearing, Ms. Lightle relies on *Baldini v. Baldini* (1999), 46 R.F.L. (4th) 407, 89 A.C.W.S. (3d) 97 (B.C.S.C.), to argue that the Court should impute \$200,000 in income to Mr. Kotar because it was his conduct in failing to disclose his ownership of the Panamanian asset that led to his termination from employment with PI Financial. I found in my decision on April 8 that the case before me was distinguishable from *Baldini*. Mr. Baldini had been warned by his employer on a number of occasions not to do personal work on company time and not to use company materials for personal projects but continued to do so. The Court also found that Mr. Baldini had not made reasonable efforts to find other employment.
- [24] In the case before me, Mr. Kotar was terminated because of his undisclosed offshore asset, an investment made four years before the parties' marriage ended. Mr. Kotar had no warning to close the account or face dismissal. Rather, once it was discovered by his employer, the existence of the asset led to Mr. Kotar's abrupt termination.
- [25] I explained my reasons for rejecting this argument more fully in my reasons delivered April 8, and will not repeat them here.
2. Should the decrease in support continue?
- [26] Ms. Lightle argues that Mr. Kotar has not proved that the decrease in support is warranted. She argues that the reduction in support granted to Mr. Kotar effective January 1, 2014, should not be extended beyond August 31, 2014, because he is now employed and earning more than \$24,000 in employment insurance. In the alternative, Ms. Lightle submits that if Mr. Kotar is not currently employed, he is intentionally underemployed and income should be imputed to him.
- [27] The assertion that Mr. Kotar is employed stems from a PowerPoint presentation Ms. Lightle obtained from a potential investor to whom Mr. Kotar sent it on September 10, 2014. Mr. Kotar originally made the presentation at a conference addressing the potential for commercial exploitation of medical marihuana production. Mr. Kotar is described in the body of the presentation on a slide titled "Our People" as follows:

- Hugo M. Kotar, Corporate Finance

- Hugo is a McGill University graduate in Economics with 17 years of experience as an Investment Advisor. Hugo joined Canaccord Genuity in 2004 as a Sr Investment Advisor and Vice President, and was one of the firm's top 20 advisors in 2009 and 2010.
- [28] Mr. Kotar is also listed as a contact person along with Paul Pederson. The title page is dated August 2014 and indicates the company name is Westcoast Acquisition Corp. "which is to be rebranded".
- [29] Ms. Lightle submits this presentation is proof Mr. Kotar is employed. She also relies on her sighting of Mr. Kotar in a suit downtown and Mr. Kotar's attendance at an office belonging to a company controlled by Mr. Pederson (an attendance confirmed by Ms. Lightle's current husband clandestinely calling and asking for Mr. Kotar).
- [30] Mr. Kotar explained that he has been working since the spring of this year on finding a job with a start-up company in the medical marihuana field. He says he has received an offer of future employment from Mr. Pederson's company contingent on the company receiving preliminary licencing approval from the Government of Canada.
- [31] Mr. Pederson swore an affidavit confirming that he arranged for Mr. Kotar to speak at the "Green Rush Financial Conference in Vancouver on May 7, 2014". Mr. Pederson also confirmed that he has allowed Mr. Kotar to use his office and computer in order to prepare taxes, court applications and look for employment. Mr. Pederson confirmed that Mr. Kotar has not engaged in any work for any company Mr. Pederson is involved in, other than the conference presentation which was an unpaid role.
- [32] The offer of employment extended by Mr. Pederson is contingent on Westcoast Acquisition Corp. obtaining preliminary approval from Health Canada. The position is that of vice-president of corporate finance with a starting salary of \$42,000 annually, increasing to \$84,000 on the company receiving a full licence from Health Canada. At that point a further performance bonus of up to 5% of annual salary would also be paid.
- [33] Mr. Kotar acknowledges that this salary is less than what he earned as a financial advisor at a brokerage house, but says that he would also receive an equity position in the company, which could potentially mean a return well in excess of \$1 million. He was quick to point out, however, that the company is a start-up and that many hurdles have to be cleared (including licensing by Health Canada) before any of this would fall into place.
- [34] While I acknowledge that Ms. Lightle has reason to be skeptical about Mr. Kotar's evidence, given his failure to disclose the existence of the Panama asset and his failure to pay support on a regular basis when he was employed, I conclude that Mr. Kotar has established that he is not employed at this time.
- [35] Mr. Kotar continues to receive employment insurance which is confirmed by the ongoing garnishment of his federal cheque. Mr. Kotar provided evidence of a move to a significantly less expensive apartment in response to his reduced financial circumstances. There is no dispute that Mr. Kotar is currently under investigation by the Securities Commission for

failing to disclose the offshore asset to his former employer. It seems improbable that Mr. Kotar would risk committing employment insurance fraud by collecting employment insurance while employed for Westcoast Acquisition, a move that would almost certainly end any hope he currently has of regaining his standing as a financial advisor.

- [36] Having accepted that Mr. Kotar remains unemployed, should income be attributed to him on the basis that he has failed to take reasonable steps to become employed? Put another way, is Mr. Kotar intentionally unemployed?
- [37] Ms. Lightle submits that if Mr. Kotar has not been able to find employment after all these months in his preferred field, he should accept employment elsewhere.
- [38] Mr. Kotar is evidently an ambitious, intelligent person who has a track record of significant earnings as an investment advisor. However, that work is not currently open to him in light of the securities investigation. I accept his submission that his best chance of regaining a significant income and being able to support his family at the level they enjoyed before his termination lies in the industry in which he has always worked and which he knows best. It appears he is close to achieving that goal. The company which has made the contingent offer of employment expects preliminary approvals by the end of December or early January.
- [39] In the circumstances, I do not find that Mr. Kotar is intentionally unemployed, but is rather actively looking for work in his field. Therefore, I conclude that the reduction of support ordered effective January 1, 2014, should continue. Mr. Kotar is to inform Ms. Lightle within seven days of accepting employment with any individual or corporation, or within seven days of receiving any increase in income beyond the \$500 a week he currently receives from employment insurance. He is to provide Ms. Lightle with a copy of any contract he enters into relating to his employment. Mr. Kotar is also to provide Ms. Lightle with a copy of his income tax return by May 15 each year, and is to provide her with a copy of his assessment from the CRA within seven days of its receipt each year.
- [40] In summary, I conclude that it is not appropriate to order reversion to support levels based on a \$200,000 income. Support is to continue based on Mr. Kotar's employment insurance income, and is to be adjusted in accordance with the Federal Child Support Guidelines, SOR/97-175, and the midpoint of the Spousal Support Advisory Guidelines, upon Mr. Kotar obtaining employment. For clarity, the suspension of the running of the five-year period before review of spousal support is to occur is extended and will resume running when Mr. Kotar resumes paying spousal support.
3. Should arrears for 2013 be cancelled or reduced?
- [41] Under the February 2014 Court of Appeal order Mr. Kotar was to pay a total of \$5,829 per month in spousal and child support, or \$69,948 for the year. He actually paid \$11,418 in 2013, leaving arrears of \$58,530.

- [42] Mr. Kotar submits that his arrears should be reduced because in 2013 he only earned \$63,000, nowhere close to the \$200,000 on which the support orders were based.
- [43] On an application of this kind, the Court must consider the factors in ss. 17(4) and (4.1) of the Divorce Act described in the preceding section. In addition to the statutory requirement of a material change in circumstances, the common law has imported the test developed in relation to what is now the Family Law Act, S.B.C. 2011, c. 25: S.A.R. v. L.G.R., 2011 BCSC 712, at para. 45; Lewis v. Lewis (1999), 2 R.F.L. (5th) 417, 92 A.C.W.S. (3d) 656 (B.C.S.C.) at para. 16. Under that test, arrears of support will be reduced or cancelled if it is grossly unfair not to do so in the circumstances.
- [44] The test to be applied is set out more fully in Earle v. Earle, 1999 BCSC 283, 86 A.C.W.S. (3d) 764 at para. 27:
- [27] [Payors] can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:
- i. the change was significant and long lasting and
 - ii. the change was real and not one of choice and
 - iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [45] Mr. Kotar's submission respecting cancellation of arrears for 2013 is made primarily on the basis that the income he earned in 2013 was significantly lower than the income attributed to him. However, Mr. Kotar was employed at Canaccord until June 2013, and then at PI Financial until the end of November. In the result, for 11 of the 12 months of 2013, Mr. Kotar was employed in the same occupation in which he earned significant income in 2011 and 2012.
- [46] While Mr. Kotar has filed an income tax return claiming income of \$63,000 in 2013, that return was filed late and the CRA assessment was not provided to the Court. In this regard it is noteworthy that in 2011, Mr. Kotar claimed to have income of \$150,000 while his actual assessment by the CRA was \$353,000 (although a portion of that appears to have been due to RRSP withdrawals). In 2012, Mr. Kotar claimed income of \$154,000 but was found by the CRA to have income of \$186,000.
- [47] In addition, I note that Mr. Kotar made no payments at all until his wages were garnished by the Family Maintenance Enforcement Program in May 2013 even though he was still employed as a financial advisor. There is no dispute that he received a \$70,000 loan from PI Financial mid-2013 that was to be paid down through regular bonus payments if targets were met. In light of his termination, it is unclear whether that sum will be treated as income or debt.

- [48] In short, I do not accept Mr. Kotar's submission that his income for 2013 justifies a reduction in child and spousal support arrears.
- [49] An important factor in assessing whether it would be grossly unfair not to cancel the arrears is whether the arrears could be paid in future. As explained in Earle at para. 26:
- [26] Not being able to pay now is not a valid legal reason to cancel or reduce arrears. They will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
- [50] On his own evidence, Mr. Kotar expects to regain his footing and earn substantial income comparable to his earnings at Canaccord. If the job with Mr. Pederson's company pans out, Mr. Kotar could hold 2% of the company's equity, valued at millions of dollars. While that position is not a certainty, I find it probable Mr. Kotar will find a comparable position. I therefore conclude that it is likely that Mr. Kotar will be able to pay arrears of support in future.
- [51] In the result, I dismiss Mr. Kotar's application to reduce arrears of support owing for 2013.

COSTS

- [52] Success has been divided. I make no order as to costs.

The Honourable Madam Justice L.A. Fenlon

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